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No. 80-788

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

In re Corrugated Container Antitrust Litigation
M.D.L. 310.

ADAMS EXTRACT COMPANY, ET AL.,
Petitioners,

vs.

CHARLES J. FRANEY AND ALEX HOPKINS,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I. INTRODUCTION

Respondents have failed to distinguish appellate authority in direct conflict with the decision of the Fifth Circuit below and their citation to and discussion of irrelevant authority does not support the Fifth Circuit's erroneous decision. Petitioners here simply point to the direct conflict between the Circuits on the important issues raised in this Petition and distinguish the authority relied upon by Respondents.

Petitioners also attach, as Appendix D, the Brief For The United States of America As Amicus Curiae in *In re Corrugated Container Antitrust Litigation, M.D.L. No. 310, Appeal of Philip L. Fleischacker.* As previously noted, (Petition p.3, n.1), the *Fleischacker* appeal, now pending before the Second Circuit, arises from the same factual setting and presents the identical legal issues as the case at bar. The Second Circuit invited the Department of Justice to submit an amicus brief in *Fleischacker* because the issues raised in these appeals directly impact the relationship between the executive and the judiciary in the administration of the federal immunity statute. The amicus brief, which was received by Petitioners after the Petition was filed, is reprinted in full and is a thorough statement of the views of the United States on the important issues raised herein.[1]

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[1] The Department of Justice did not submit an amicus brief in support of certiorari because by the time it learned of this Petition, it did not have sufficient time to prepare a response. The Department did state, however, that it would consider filing an amicus brief on the merits should certiorari be granted.

II. ARGUMENT

A. There Is A Direct Conflict Between The Circuits

Respondents claim that the Fifth Circuit's decision below in ruling that a court lacks authority to compel testimony derived from previously immunized testimony is not in conflict with the Eighth Circuit's decisions in *Appeal of Starkey,* 600 F.2d 1043 (8th Cir. 1979) and *Little Rock School District* v. *Borden, Inc.,* 1980-2 Trade Cases Paragraph 63,522 at p.76,783 (8th Cir. 1980), and with the Seventh Circuit's decision in *Patrick* v. *United States,* 524 F.2d 1109 (7th Cir. 1975). However there is no question that the decision below *is* in conflict with these decisions with respect to whether a court has authority to determine derived use in assessing the validity of a Fifth Amendment claim of privilege.[2]

Respondents' claim a lack of conflict between the decision below and the Eighth Circuit's decisions arguing that the testimony in those cases was compelled not because it was derived from immunized testimony and therefore unavailable for use in future prosecutions but because the Deputy Attorney General of Arkansas' *argument* that the testimony would be derived from immunized testimony itself somehow operated as a grant of immunity. However, even a brief review of the Eighth Circuit's opinion in *Starkey* reveals that it compelled Starkey's testimony because the testimony was derived from

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[2] Because it ruled it did not have *authority* to do so, the Fifth Circuit below did not reach Petitioners' Question Presented No. 3, whether deposition testimony is "derived from" previously immunized testimony under the federal immunity statute, where a transcript of the immunized testimony is used by deposing counsel to formulate the deposition questions. Thus, as pointed out by the Department of Justice, the only court to rule on this issue, the Eighth Circuit in *Starkey,* held that the subsequent testimony would be derived. (App. 17d, n.9.)

immunized testimony.[3] Indeed, both the Court below and the Department of Justice[4] recognized the direct conflict between *Starkey* and the case at bar. In footnote 5 of the opinion below, cited by Respondent Franey to refute the existence of a conflict, the Fifth Circuit stated:

> In *Starkey,* the court held that a witness at a civil deposition had no right to invoke his fifth amendment privilege against self-incrimination since the deposition testimony would be tainted by grand jury testimony that the witness had given under a grant of immunity. *For the reasons we state in text, we disagree with the Eighth Circuit's apparent assumption that the district court had the authority to determine whether the grand jury testimony would be "tainted."* (App. 11a, n.5) (emphasis supplied.)

If after *Starkey* there was any doubt as to the Eighth Circuit's exercise of its authority to determine derived use in the context of a motion to compel testimony, that doubt was dispelled by the decision of a separate Eighth Circuit panel in *Little Rock School District* v. *Borden, Inc., supra.* In that case, contrary to Respondent Franey's claim, the court once again compelled testimony as derived from immunized testimony without reference to an implied grant of immunity.

Respondent Hopkins' claim that the Seventh Circuit did not make a "prospective" determination of "taint" in *Patrick* v. *United States, supra,* is equally unfounded. In *Patrick,* Judge

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[3] In *Starkey,* the Eighth Circuit stated:

> The state prosecutor was never requested to give Starkey immunity from criminal prosecution. Nevertheless, Starkey clearly has immunity from criminal prosecution for the deposition testimony because such testimony would be tainted by the federal grand jury, testimony for which Starkey received "use" immunity pursuant to 18 U.S.C. § 6001 *et seq.*

Starkey, *supra,* 600 F.2d at 1046.

[4] The Department of Justice, recognizing the direct conflict between the circuits, found the Eighth Circuit's reasoning as to why a court does have authority to determine derived use in this context to be "more persuasive." (App. 23d-25d.)

(now Justice) Stevens reasoned that a witness would not incriminate himself by his testimony in a civil suit because the testimony would be "indirectly derived from" the questioner's (in this case, the government's) use of the witnesses' immunized grand jury testimony. *Id.* at 1120. As in *Starkey* and *Borden,* the Government's participation as a party to the suit in *Patrick* was irrelevant to the determination of derived use.[5]

Thus this Petition presents a direct conflict between the decision below and decisions in the Seventh and Eighth Circuits over the issue of a court's authority to determine derived use in assessing the validity of a Fifth Amendment claim.[6]

B. Respondents' Arguments On The "Merits" Are Irrelevant To This Petition

Unable to distinguish appellate authority in direct conflict with the decision below, Respondents have tried to obscure the issues in this Petition on their merits through citation of authority not relevant to this case. For example, Respondents cite cases such as *In re Daley,* 549 F.2d 469 (7th Cir.), *cert. denied,* 434 U.S. 829 (1977) and *Ullman* v. *United States,* 350 U.S. 422 (1956), for the proposition that a court has no power to grant immunity absent a request from the Department of Justice. While Petitioners in no way dispute this authority, they assert that the issue is not whether a court can grant immunity,

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[5] The Department of Justice agreed that the presence of the Government as a party in *Starkey* had "no bearing on the question whether the civil testimony is derived from the immunized testimony." (App. 19d.) The Department also cited *Patrick* in support of the proposition that "a court may—and indeed must—determine the scope of immunity already granted when necessary to determine whether a claim of privilege is valid." (App. 24d.)

[6] The district court's refusal to reach the taint issue in *In re Folding Carton Antitrust Litigation,* 465 F.Supp. 618 (N.D. Ill.), rev'd on other grounds, 609 F.2d 867 (7th Cir. 1979), is yet another example of the conflict among the courts below concerning these important issues.

but whether under this Court's decisions in *Kastigar* v. *United States,* 406 U.S. 441 (1972) and *Hoffman* v. *United States,* 341 U.S. 479, 487 (1951), a court must determine derived use in assessing the validity of a Fifth Amendment claim. Petitioners submit that such a ruling is within the courts' traditional powers and does not amount to a judicial grant of immunity.

A court's determination of "derived use" under the immunity statute is no different from a court's determination of statute of limitations or double jeopardy bars, rulings routinely made in Fifth Amendment proceedings to assess whether a claim of privilege is valid. Moreover, a court's decision to compel testimony "derived from" immunized testimony will not frustrate the congressional purpose to grant the executive branch discretion in conferring immunity. *In every instance in which a court finds that testimony will be "derived from" immunized testimony, the Department of Justice will have already decided to grant the witness immunity, as was done here with Respondents Franey and Hopkins.* Thus it is the prosecutor, not the subsequent judge or deposing counsel, who has balanced the public need for testimony against its interest in criminally prosecuting the individual. Since the prosecutor makes that decision knowing that any future prosecution will have to be based on evidence obtained from wholly independent sources, a court's requiring testimony derived from prior immunized testimony can in no way affect the decision to grant immunity in the first place.

Nor will a decision to compel derivative testimony impede prosecutions based on independent evidence. As pointed out in the Justice Department amicus, "if the judge limits the scope of the questioning to matters within the scope of the immunized testimony, it is unlikely that prosecutoral efforts will be hampered." (App. 18d, 11.). Moreover, as the Department noted, "this interpretation of the immunity statute would have the beneficial effect of allowing private litigants to obtain relevant

testimony that otherwise might be unavailable because of witnesses' claims of Fifth Amendment privilege." (*Id.*)[7]

Respondents' also confuse the issues on the merits of this action through citation of cases such as *In re Folding Carton Antitrust Litigation, supra, United States* v. *Kuehn* 562 F.2d 427 (7th Cir. 1977), and *United States* v. *Seiffert,* 501 F.2d 974 (5th Cir. 1974). In each of those cases it was properly determined that evidence or testimony was *not* "derived from" immunized testimony because the immunized testimony was *not used* to produce the subsequent statements.[8] Here, however,

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[7] This Court's decisions in *Kastigar* v. *United States,* 406 U.S. 441 (1972) and the recently decided *United States* v. *Apfelbaum,* 445 U.S. 115 (1980), quite simply and compellingly demonstrate that the Fifth Amendment privilege against self-incrimination must be interpreted to permit maximum testimony and evidence while simultaneously protecting the individual involved from criminal prosecution. That the need for evidence is paramount and can co-exist with the legitimate scope of the privilege is demonstrated in *Apfelbaum* where this Court noted that a witness must testify even though his immunity is *not* coextensive with the protection that would be obtained from silence:

> Such grants of immunity would not provide a full and complete substitute for a witness's silence because, for example, they do not bar the use of the witness's statements in civil proceedings. Indeed, they fail to prevent the use of such statements for any purpose that might cause detriment to the witness other than that resulting from subsequent criminal prosecution .... such as threats of liability in civil suits, disgrace in the community, or the loss of employment.
>
> Id. at 124-125.

[8] The case of *United States* v. *Rice,* 421 F.Supp. 871 (E.D. Ill. 1976), rev'd on other grounds, sub nom, *United States* v. *Kuehn,* 562 F.2d 427 (7th Cir. 1977) does, however, illustrate the operation of the *Kastigar* requirements of an independent source. In *Rice,* a state prosecutor's reading of immunized federal grand jury transcripts was found to have influenced his questions in a state grand jury proceeding against the same witness so as to taint the testimony in the state proceeding. The court's reasoning in *Rice* thus fully supports the

(Footnote continued on following page.)

there is no dispute over Petitioners' use of Respondents' immunized testimony in developing the sought after deposition testimony. Thus in deciding the derivative use issues this Court's attention will more properly be drawn to cases such as *United States* v. *Nemes,* 555 F.2d 51 (2nd Cir. 1977), *United States* v. *Kurzer,* 534 F.2d 511 (2nd Cir. 1976), *United States* v. *First Western State Bank of Minot,* 491 F.2d 780 (8th Cir.), *cert. denied,* 419 U.S. 825 (1977), and *United States* v. *McDaniel,* 482 F.2d 305 (8th Cir. 1973), in which use of immunized testimony was found to taint evidence or testimony obtained through that use. (*See also App.* 15d-20d.)

Finally, Respondents claim that certiorari should be denied arguing that the District Court did not follow the Eighth Circuits' guidelines in *Starkey* that "only those questions which are within the same time, geographical and substantive framework of the (immunized) testimony," need be answered. *Appeal of Starkey, supra,* 600 F.2d at 1048. However, the scope of any taint is a false issue, not properly before this Court since it was not addressed by the court below. Moreover, any dispute over the *application* of the *Starkey* guidelines does not bear on the need to grant certiorari on the important issue of a court's authority to determine derived use in assessing the validity of a Fifth Amendment claim.

(Footnote continued from preceding page.)

proposition that where immunized testimony is used to develop questions in a subsequent proceeding, the testimony in that proceeding will be deemed "derived from" the compelled testimony.

In *United States* v. *Kuehn, supra,* the Seventh Circuit reversed, and in dicta, rejected the district court's finding not because use of immunized testimony to frame questions in a subsequent proceeding would not taint the subsequent testimony, but because the prosecutor had adequately proved that he did *not use* the immunized testimony but relied instead upon independent sources of information for the subsequent examination.

III. CONCLUSION

The Fifth Circuit's erroneous decision below is in direct conflict with the decisions of other Courts of Appeals and with this Court's decisions in *Kastigar* v. *United States, supra,* and *Hoffman* v. *United States, supra.* Witnesses, regardless of the jurisdiction in which they happen to be found, should be required to testify if their testimony, because it is derived from immunized testimony, can not be used in prosecutions against them. The Fifth Circuit's refusal to exercise its inherent judicial authority to prevent improper invocations of the Fifth Amendment privilege will keep important testimony from the trier of fact and, in cases such as this, will frustrate Congressional policy to encourage vigorous private enforcement of the antitrust laws.

For all of the foregoing reasons and those contained in the Petition, Petitioners respectfully request that a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 80-1090

IN RE: CORRUGATED CONTAINER
ANTITRUST LITIGATION,

M.D.L. No. 310

APPEAL OF PHILLIP L. FLEISCHACKER, *Deponent.*

On Appeal from the United States District Court for the Southern District of New York, Honorable John V. Singleton, Jr., Judge, Presiding Pursuant to 28 U.S.C. 1407(b).

BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS CURIAE

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November, 1980

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IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 80-1090

IN RE: CORRUGATED CONTAINER
ANTITRUST LITIGATION,

M.D.L. No. 310

APPEAL OF PHILLIP L. FLEISCHACKER, *Deponent.*

**On Appeal from the United States District Court
for the Southern District of New York,
Honorable John V. Singleton, Jr., Judge, Presiding
Pursuant to 28 U.S.C. 1407(b).**

BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS CURIAE

ISSUE PRESENTED

Whether a witness who claims his Fifth Amendment privilege against self-incrimination may be compelled to answer questions that are based on and confined to the subject matter, time and geographic scope of testimony previously given by that witness under a grant of immunity pursuant to the federal immunity statute, 18 U.S.C. 6001-6005.

STATEMENT

This is an appeal pursuant to 28 U.S.C. 1291 from an order issued by the Honorable John V. Singleton, Jr., Judge of the United States District Court for the Southern District of Texas, exercising the powers of a district judge in the Southern District of New York, pursuant to 28 U.S.C. 1407(b), in *Corrugated Container Antitrust Litigation,* M.D.L. No. 310. (A. 452-454.) Judge Singleton held appellant Phillip L. Fleischacker, a non-party witness, in civil contempt for his refusal, based on a claim of Fifth Amendment privilege, to answer questions at his deposition. Fleischacker was ordered confined pursuant to 28 U.S.C. 1826 and fined $5000. The order was stayed by Judge Singleton pending appeal.

Facts

In August 1977 appellant, Phillip L. Fleischacker, was subpoenaed to testify before a federal grand jury in the Southern District of Texas, which was investigating alleged price-fixing in the corrugated paper container industry. After Fleischacker invoked his Fifth Amendment privilege against self-incrimination, he was granted "use immunity" and ordered to testify pursuant to 18 U.S.C. 6002 and 6003. (A. 2.) He subsequently was interviewed by Department of Justice attorneys and gave testimony before the grand jury under that grant of immunity.

The grand jury returned two indictments charging several individual and corporate defendants with conspiracy to fix prices and otherwise restrain trade in the corrugated paper industry. Thirty defendants pled nolo contendere and were sentenced. Fleischacker, who was not named as a defendant, was subpoenaed to appear at the trial of the remaining defendants. Judge Singleton, presiding over the criminal trial, entered a second immunity order compelling Fleischacker's testimony at trial (A. 212), but Fleischacker was never called as a witness. The defendants who stood trial were acquitted.

While the grand jury investigation and criminal trial were in progress, purchasers of corrugated products filed numerous private treble damage actions alleging Sherman Act violations by corrugated paper manufacturers, some of whom were defendants in the criminal proceedings. In November 1977, the Judicial Panel on Multidistrict Litigation, pursuant to 28 U.S.C. 1407, transferred these private actions to the Southern District of Texas for consolidated pretrial proceedings. *In Re Corrugated Container Antitrust Litigation,* M.D.L. No. 310.

After the conclusion of the criminal trial, Fleischacker was subpoenaed for deposition in New York on January 22, 1980, by the plaintiff class in the consolidated civil actions.[1] He appeared but declined on Fifth Amendment grounds to give any information except his name and his home address and telephone number. In February 1980, Judge Singleton ordered the disclosure of transcripts of grand jury testimony and related Department of Justice interviews of several witnesses, including Fleischacker, to counsel for plaintiffs in the consolidated civil actions.

On February 29, 1980, a second subpoena was issued from the United States District Court for the District of New Jersey, requiring Fleischacker to appear in New York on March 10, 1980 for further deposition. (A. 314.) On March 6, 1980, Judge Singleton issued Pretrial Order 39 (A. 316-317), which provided that he would preside, by telephone conference call or in person, at Fleischacker's deposition in the Southern District of New York, and, pursuant to 28 U.S.C. 1407, would exercise the powers of a District Judge for the Southern District of New York. The order, which was filed in the United States District Court for the Southern District of New York and served on Fleischacker, also directed Fleischacker to attend his deposition. On March 10, 1980, Fleischacker appeared for his

[1] Other witnesses who had appeared before the grand jury were also subpoenaed for depositions.

deposition in New York. Judge Singleton, in Houston, presided over the deposition by conference telephone connection.

Most of the questions asked of Fleischacker at his deposition were read verbatim from his immunized interview transcript; other questions were asserted by examining counsel to be derived from the interview or grand jury testimony.[2] As to each question, Fleischacker invoked his Fifth Amendment privilege against self-incrimination. Judge Singleton ordered him to respond on the ground that Fleischacker could have no legitimate fear of prosecution based on his answers, since they would be derived from his prior immunized testimony. Each time, Fleischacker restated his Fifth Amendment objection and persisted in his refusal to answer, and each time Judge Singleton held him in contempt for his refusal. At the termination of the deposition, Judge Singleton ordered Fleischacker confined for sixty days, pursuant to 28 U.S.C. 1826, and imposed a fine of $5,000. (A. 440.) The contempt order was stayed pending immediate appeal.

Fleischacker's Appeal

Because there was uncertainty as to which court of appeals had jurisdiction (see A. 317), Fleischacker appealed both to this Court and to the United States Court of Appeals for the Fifth Circuit. On April 7, 1980, this Court dismissed his appeal without prejudice to reinstatement if the Fifth Circuit held that it did not have jurisdiction.

The Fifth Circuit consolidated Fleischacker's appeal with the appeals of two other witnesses, Charles Jerome Franey and

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[2] Counsel present at the deposition, the witness, and the presiding judge had copies of transcripts of Fleischacker's two Department of Justice interviews and his grand jury testimony and referred to specific interview questions during the deposition. (A. 365-439.) Transcripts of the interviews, but not of the grand jury testimony (which consisted of only seven pages of transcript, see A. 436), are included in the appendix. (A. 3-211.)

Alexander Hopkins, who had been held in contempt by Judge Singleton for their refusals to answer similar questions in depositions taken in the Southern District of Texas. On May 7, 1980, the Fifth Circuit reversed the contempt citations against Franey and Hopkins[3] and dismissed Fleischacker's appeal for lack of jurisdiction. *In re Corrugated Container Antitrust Litigation,* 620 F.2d 1086 (5th Cir. 1980).

Fleischacker's appeal from Judge Singleton's March 10, 1980, orders holding him in contempt was redocketed here on May 15, 1980.

SUMMARY OF ARGUMENT

Whether the district court's order compelling testimony from appellant Fleischacker over his claim of Fifth Amendment privilege against self-incrimination should be affirmed or reversed depends on the scope of a grant of immunity under the federal immunity statute, 18 U.S.C. 6001-6005. For the Fifth Amendment prohibits compulsion of testimony only if the testimony might tend to show that the witness has engaged in criminal activity and if there is a possibility that it may be used against the witness in a criminal prosecution.

One reasonable interpretation of the immunity statute is that it prohibits use against Fleischacker of the testimony sought from him in this case. For the statute protects a witness from use of evidence "derived from" his immunized testimony. And in this case it is clear that the transcript of testimony given by Fleischacker under a grant of immunity in a prior proceeding was used by examining counsel during the deposition and provided the basis for the questions Fleischacker refused to answer. Those questions were read directly from, or were

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[3] This brief does not address the law of the case arguments presented by Fleischacker, but we do not believe that the Fifth Circuit's decision binds the Second Circuit on this appeal.

closely related in subject matter and time to, his immunized testimony. If this is the correct interpretation of the statute, Fleischacker had no Fifth Amendment right to remain silent, and the district court's order compelling his testimony should be affirmed.

The other reasonable interpretation of the immunity statute is that it does not extend to testimony given in a subsequent proceeding by the immunized witness himself. If the witness voluntarily answers questions based on his prior immunized testimony, that testimony is not compelled, and there is no Fifth Amendment prohibition on its use against the witness. But the witness need not give any new testimony that might incriminate him. He has the opportunity to assert his Fifth Amendment rights when he is asked questions based on his prior testimony, and if he does so, as Fleischacker did, he cannot be compelled to give incriminating testimony. Thus, with respect to any testimony sought from the immunized witness himself in a subsequent action, the witness' Fifth Amendment rights are fully protected by preserving this right to remain silent. There is, accordingly, no need to interpret the prior grant of immunity to displace the constitutional privilege. If this is the correct interpretation of the statute, the district court erred in overruling Fleischacker's Fifth Amendment claim, and the order compelling his testimony should be reversed.

ARGUMENT

I. THE FIFTH AMENDMENT FORBIDS COMPELLED TESTIMONY ONLY IF THAT TESTIMONY MAY BE USED TO PROSECUTE THE WITNESS.

The duty to provide testimony when called by a court or grand jury and the corresponding power of the court to compel testimony are firmly established in American law. See *Kastigar* v. *United States,* 406 U.S. 441, 443-445 (1972). But the Fifth Amendment limits in an important respect the government's power to compel testimony by providing that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself.' This means not only that a defendant may not be compelled to take the stand in a criminal trial, but also that the government may not compel any testimony that might later be used to prosecute the witness.

If no criminal prosecution of the witness can arise from his testimony, however, the public interest in obtaining that testimony prevails. The Fifth Amendment does not allow a witness to remain silent even if his testimony will embarrass him, harm him in his business, subject him to civil liability, or incriminate others. See, *e.g., United States* v. *Apfelbaum,* 445 U.S. 115, 124-125 (1980); *Zicarelli* v. *New Jersey State Comm'n of Investigation,* 406 U.S. 472 (1972); *Gardner* v. *Broderick,* 392 U.S. 273, 279 (1968); *Uniformed Sanitation Men Ass'n* v. *Commissioner of Sanitation,* 392 U.S. 280, 284-285 (1968); *Ullmann* v. *United States,* 350 U.S. 422, 430-431 (1956); *Rogers* v. *United States,* 340 U.S. 367 (1951); *Smith* v. *United States,* 337 U.S. 137, 147 (1949); *Brown* v. *Walker,* 161 U.S. 591, 605-606 (1896).

Because both the public interest in obtaining testimony and the witness' Fifth Amendment rights must be protected, a witness' claim of privilege does not automatically entitle him to remain silent. It is for the court, in each case, to determine whether the privilege is properly invoked. *Hoffman* v. *United*

States, 341 U.S. 479, 487 (1951); *Rogers* v. *United States, supra.* The witness may remain silent only if the court concludes that the testimony sought (1) might provide some evidence of his involvement in criminal activity and (2) might be used against him in a criminal prosecution. See *Kastigar* v. *United States, supra; Murphy* v. *Waterfront Comm'n,* 378 U.S. 52 (1964).

In determining whether testimony sought is potentially incriminating, the court must look to the questions themselves and the surrounding circumstances. *Hoffman* v. *United States, supra,* 341 U.S. at 486-489. The witness is not required to incriminate himself in order to demonstrate the validity of his claim of privilege, but where the possibility of incrimination is not evident from the questions, the witness must explain the basis for his assertion that the answers might be incriminating. *United States* v. *Melchor Moreno,* 536 F.2d 1042 (5th Cir. 1976); *United States* v. *Curcio,* 234 F.2d 470 (2d Cir. 1956), *rev'd on other grounds,* 354 U.S. 118 (1957). Testimony need not provide direct evidence of criminal activity in order to be incriminating; any testimony that might link the witness to criminal conduct or focus investigation on him is shielded. *Hoffman* v. *United States, supra,* 341 U.S. at 487; *Blau* v. *United States,* 340 U.S. 159, 161 (1950).

If the testimony sought may be incriminating, the witness need not show that it is likely that the evidence will be used against him, but there must be some possibility of such use. *United States* v. *Miranti,* 253 F.2d 135 (2d Cir. 1958); *In re Master Key Litigation,* 507 F.2d 292, 294 (9th Cir. 1974); *In re Folding Carton Antitrust Litigation,* 609 F.2d 867, 871-872 (7th Cir. 1979). Facts that create an absolute bar to use of the testimony will establish lack of basis for the claim of privilege. *Brown* v. *Walker, supra.*

The parties do not dispute the general principles applicable to assertions of Fifth Amendment privilege. Rather, what is at

issue is the effect of plaintiffs' use of appellant Fleischacker's prior testimony, given under a grant of "use immunity" pursuant to 18 U.S.C. 6002 and 6003, on his assertion of privilege in this case.[4]

Appellees contend, and Judge Singleton held, that Fleischacker has no Fifth Amendment right to refuse to answer the questions asked at his deposition. Because these questions were based on prior immunized testimony, they concluded that the statutory grant of immunity would prohibit use of Fleischacker's answers against him. Fleischacker contends that because he has not been granted immunity for any testimony he may give in this civil action, he is exposed to a risk of prosecution on the basis of his testimony, and thus that he has a Fifth Amendment right to remain silent.

II. IT COULD BE CONCLUDED THAT THE FEDERAL IMMUNITY STATUTE PROHIBITS USE AGAINST FLEISCHACKER OF THE TESTIMONY SOUGHT, AND THUS THAT HE HAS NO FIFTH AMENDMENT RIGHT TO REMAIN SILENT.

Under the first interpretation of the immunity statute, prosecutorial use of evidence derived from immunized testimony is prohibited by the immunity statute even when that evidence is the testimony of the immunized witness himself. If this is the correct interpretation, then, on the facts of this case, we agree with appellees that the testimony sought would be derived. But we emphasize that, to avoid encroaching on the executive power to control grants of immunity, the court should compel incriminating testimony over a claim of privilege only when it is clear that the testimony will be derived from prior testimony.

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[4] Neither party disputes that Fleischacker's interview statements, as well as the testimony he gave before the grand jury itself, were covered by the grant of immunity. (See A. 130.)

A. The Federal Immunity Statute Is Coextensive with the Fifth Amendment in Protecting a Witness Against Use of His Immunized Testimony.

Under the federal immunity statute, 18 U.S.C. 6001-6005, when a witness in a federal court proceeding claims his Fifth Amendment privilege, the government may obtain a court order compelling the witness to testify in that proceeding. 18 U.S.C. 6003. The witness may not then refuse to testify,

> but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

18 U.S.C. 6002.

The Supreme Court held this statute constitutional because it construed it to provide immunity coextensive with the scope of the Fifth Amendment privilege not to incriminate oneself—"immunity from the use of compelled testimony and evidence derived therefrom." *Kastigar* v. *United States, supra,* 406 U.S. at 443 (1972); see also *United States* v. *Apfelbaum, supra,* 445 U.S. at 123. The Court in *Kastigar,* while rejecting the contention that full transactional immunity is the only constitutionally sufficient substitute for the Fifth Amendment right to remain silent,[5] emphasized that protection against

[5] Petitioners in *Kastigar* had based their argument that transactional immunity was required in *Counselman* v. *Hitchcock,* 142 U.S. 547 (1892). In *Counselman,* the Court had invalidated a statute that afforded a witness "protection only against the use of the specific testimony compelled from him under the grant of immunity" because it " 'could not, and would not, prevent the use of his testimony to search out other testimony to be used against him.' " 406 U.S. at 450, quoting 142 U.S. at 564. The Court added: "In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates." 142 U.S. at 585-586.

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direct use of compelled testimony is not sufficient. Immunity from indirect use is also required.[6] The immunity statute is constitutional only because "[i]t prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." 406 U.S. at 453 (emphasis in original). Like the Fifth Amendment itself, the statute "assure[s] that the compelled testimony can *in no way* lead to the infliction of criminal penalties." 406 U.S. at 461 (emphasis added).[7] This constitutional requirement that a witness compelled to testify under a grant of immunity be fully protected from prosecutorial use of his compelled testimony places the burden on the government, in any prosecution of a witness who has testified previously under a grant of immunity, to demonstrate that it has relied solely on evidence from

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Later cases suggested that while derivative use immunity was required, full transactional immunity was not. See *Malloy* v. *Hogan*, 378 U.S. 1 (1964); *Murphy* v. *Waterfront Comm'n, supra*. In the Organized Crime Control Act of 1970, Congress repealed a variety of immunity statutes—most of which provided transactional immunity—and enacted more limited use and derivative use immunity provisions in 18 U.S.C. 6001-6005. See S. Rep. No. 91-617, 91st Cong., 1st Sess., 51-56 (1969); H.R. Rep. No. 91-1549, 91st Cong., 2d Sess., 42-46 (1970). In *Kastigar*, the Court referred to the statement in *Counselman* as not essential to the holding in that case. 406 U.S. at 451.

[6] Transactional immunity, however, "affords the witness considerably broader protection than does the Fifth Amendment privilege [which] has never been construed to mean that one who invokes it cannot subsequently be prosecuted." 406 U.S. at 453. Congress has the power to grant such broad immunity, but it is not constitutionally required.

[7] The statute does allow use of immunized testimony "in a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order [compelling immunized testimony]." 18 U.S.C. 6002. And that exception is constitutional. *United States* v. *Apfelbaum*, 445 U.S. 115 (1980).

"legitimate independent sources." *Id.* at 460, 462; *United States* v. *Kurzer,* 534 F.2d 511 (2d Cir. 1976); *United States* v. *Catalano,* 491 F.2d 268 (2d Cir.), *cert. denied,* 419 U.S. 825 (1974).

B. Testimony Obtained in Response to Questions Based on and Within the Scope of Immunized Testimony Is "Derived From" Immunized Testimony.

Evidence or testimony obtained by using a witness' immunized testimony is not evidence from an "independent source." It, therefore, cannot be used in prosecuting that witness.[8] See, *e.g., Kastigar* v. *United States, supra,* 406 U.S. at 454; *Appeal of Starkey,* 600 F.2d 1043 (8th Cir. 1979); *United States* v. *Nemes,* 555 F.2d 51 (2d Cir. 1977); *United States* v. *Kurzer, supra; United States* v. *Catalano, supra;* 268 (2d Cir. 1974); *United States* v. *First Western State Bank of Minot,* 491 F.2d 780 (8th Cir.), *cert. denied,* 419 U.S. 825 (1974); *United States* v. *McDaniel,* 482 F.2d 305 (8th Cir. 1973). Indeed, this Court has held that even testimonial evidence obtained from other witnesses is "derived" if immunized testimony was used to obtain it. See, *e.g., United States* v. *Kurzer, supra; United States* v. *Karathanos,* 531 F.2d 26 (2d Cir.), *cert. denied,* 428 U.S. 910 (1976).

Thus, in most cases, the close connection between the immunized testimony and testimony obtained by examining counsel in a subsequent proceeding, who has that testimony and uses it in examination covering the same subject matter and time period, would compel the conclusion that the subsequent testimony is "derived from" immunized testimony within the meaning of 18 U.S.C. 6002.

The only court to rule on the issue in the situation presented in this case—where the immunized witness is himself

[8] Use of immunized testimony to obtain derived evidence is not improper, of course, and such evidence may be used by private parties or the government for a variety of purposes.

the source of the derived testimony—held that such testimony would be within the protection afforded by the immunity statute. *Appeal of Starkey,* 600 F.2d 1043 (8th Cir. 1979).[9] Starkey had testified before a federal grand jury under a grant of immunity about matters that were the subject of a civil action subsequently brought by the State of Arkansas. The state obtained a transcript of Starkey's grand jury testimony and used it in deposing him in the civil action. The state's attorney asserted that the deposition questions were derived from the grand jury transcript, and some of the questions were read verbatim from the transcript. The Eighth Circuit held that any answers to questions within the scope of Starkey's immunized testimony would be "tainted" by the state's use of that immunized testimony. Thus Starkey's answers could not subject him to future prosecution, and he had no Fifth Amendment right to refuse to answer questions that were "within same time, geographical and substantive framework as the grand jury testimony." 600 F.2d at 1048. The court therefore affirmed an order holding him in contempt for refusal to answer such questions.[10]

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[9] In the Fifth Circuit *Corrugated* deponents' appeals, *In Re Corrugated Container Antitrust Litigation,* 620 F.2d 1086 (5th Cir. 1980) (Charles J. Franey and Alex Hopkins, Appellants), the court of appeals, for reasons with which we disagree, never reached the question whether the testimony would be derived. See pp. 24-26, *infra.*

[10] In *Little Rock School District* v. *Borden, Inc.,* 1980-2 Trade Cas. ¶ 63,522 (8th Cir. Sept. 9, 1980), the Eighth Circuit again addressed the question whether a witness has a Fifth Amendment right to refuse to give allegedly "derived" testimony. In that case it held that testimony given in a civil action in response to questions " 'within the same time, geographic and substantive framework as immunized grand jury testimony' " would be "derived" from immunized testimony even if the examining party did *not* have access to the grand jury transcripts. This holding is inconsistent with the basic principle that transactional immunity is not required by the constitution or the immunity statute and that independently obtained

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. The standard established by the court in *Starkey* is the appropriate one for determining whether testimony will be derived from immunized testimony: It is derived if examining counsel uses the immunized testimony in conducting the examination and if the examination is limited to the subject matter, time period and geographic scope of the immunized testimony.[11]

In this case Judge Singleton, presiding at the deposition, correctly determined that each of the questions asked satisfied this test. The private plaintiffs' counsel who deposed Fleischacker had access to Fleischacker's immunized testimony and admittedly relied on it in questioning him. Most of the questions asked of Fleischacker were read verbatim from the immunized interview transcript (see A. 365-449).[12] The only

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evidence may be used to prosecute a witness who has testified under a grant of immunity. See, *e.g., Appeal of Starkey, supra,* 600 F.2d at 1048, distinguishing *United States* v. *Kuehn,* 562 F.2d 427 (7th Cir. 1977) (statements of witness who repeated his immunized grand jury testimony to a newspaper reporter would be independent source). But in any event, the issue presented in *Little Rock* does not arise in this case because the examining lawyer did have the immunized testimony.

[11] This interpretation of the immunity statute would have the beneficial effect of allowing private litigants to obtain relevant testimony that otherwise might be unavailable because of witnesses' claims of Fifth Amendment privilege. As a practical matter, if the judge limits the scope of the questioning to matters within the scope of the immunized testimony, it is unlikely that prosecutorial efforts will be hampered. For the government usually will have no further interest in prosecuting the witness for any offenses suggested by such testimony or will be unable to do so in any event because of the difficulty of establishing that it has not used the immunized testimony itself.

[12] Only the questions, not Fleischacker's answers, were read as deposition questions. But we do not understand this to be the basis of appellant's argument that the questions are not derived from his

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questions that were not read verbatim dealt with the subject of any price communications between Fleischacker and representatives of other corrugated manufacturers (A. 405-408, 412-413, 419-420, 423-425).[13] This same subject was covered extensively in the immunized interviews (A. 7-128, 132-210), and Judge Singleton limited the questioning to 1970-1975, the time period covered by the grand jury's investigation (A. 405-406, 408, 413, 420, 423).[14]

Appellant seeks to distinguish *Starkey* on the ground that there the civil action was brought by the state rather than a private party and it was the state's attorney rather than counsel for a private plaintiff who argued that answers to questions based on prior immunized testimony would be tainted. But this distinction has no bearing on the question whether the civil testimony is derived from the immunized testimony. The court in *Starkey* held that the testimony sought could not be used in the subsequent civil action because it was derived from immunized testimony; it did not hold that the argument of the state's attorney operated as a separate grant of immunity for the new testimony. Thus its reasoning is fully applicable to this case.

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testimony—nor would this be a reasonable argument. Questions and answers are, in most cases, so interrelated in the examination of a witness that the questions themselves are to some extent derived from earlier answers. Indeed in overruling objections based on lack of foundation for questions read verbatim, Judge Singleton apparently looked to the answers previously given. (See, e.g., A. 388-389, 393.)

Similarly, questions seeking to fill in any gaps in the prior testimony, even if seeking new information, can reasonably be said to be based on the immunized answers. (See, e.g., A. 402-409, 412-413, 419-420, 423.)

[13] Fleischacker was also asked whether he appeared before the grand jury and was interviewed by the Department of Justice in 1977 (A. 380). The answer to that question does not appear to be derived from his testimony, but neither does it appear incriminating.

[14] No geographic limitation was imposed since the alleged conspiracies were nationwide.

Appellant admits that the testimony sought would be derived from immunized testimony "in a definitional sense" (Supp. Br. for Deponent-Appellant at 20) but contends that it would not be "derived" as Congress intended that term in Section 6002 and as the Supreme Court has interpreted it. Prosecutorial use of the testimony given in the civil action he asserts, "is *not* the type of derivative use prohibited by Section 6002 as anticipated in *Kastigar*" because "the connection [between the immunized testimony and the civil testimony] is wholly unrelated to any criminal prosecution or investigation." (*Id.* at 19-20).

Section 6002, however, contains no such limitation on the protection afforded to a witness whose immunized testimony is used to develop other evidence, nor is there any other support for appellant's contention that the participation of a private party severs the connection between immunized testimony and any evidence developed in a subsequent civil case in response to questions based on that testimony.[15]

C. Since There Was no Showing that His Testimony Might Incriminate Him by Showing Perjury in His Prior Testimony, Fleischacker Cannot Refuse to Testify on the Ground That His Testimony Could be Used in a Prosecution for Perjury.

Fleischacker also contends on appeal that his testimony cannot be compelled because it might provide evidence that

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[15] Indeed, in *United States* v. *Nemes,* 555 F.2d 51 (2d Cir. 1977), this Court suggested that evidence covered by an immunity grant might be derived through a private source. In that case, the court held that the government had failed to demonstrate the required independent source merely by denying that federal officials had seen or used testimony given by the defendant under a state grant of immunity. For, said the court, the fact that the federal officials have not seen the immunized testimony "does not preclude the possibility that someone who has seen the compelled testimony was thereby led to evidence that was furnished to federal investigators." 555 F.2d at 55.

could be used against him in a prosecution for perjury[16] or inconsistency in his prior immunized testimony. We agree that immunized testimony and information derived from such testimony may be used in a prosecution for perjury or giving a false statement in the immunized testimony. *United States* v. *Apfelbaum, supra; United States* v. *Wong,* 431 U.S. 174 (1977); *United States* v. *Mandujano,* 425 U.S. 564 (1976); *United States* v. *Housand,* 550 F.2d 818 (2d Cir.), *cert. denied,* 431 U.S 970 (1977); *United States* v. *Tramunti,* 500 F.2d 1334 (2d Cir.), *cert. denied,* 419 U.S 1079 (1974). Thus even if the testimony sought from Fleischacker would be derived from his immunized testimony within the meaning of that statute, it could be used against for that limited purpose. And a witness is entitled to claim the Fifth Amendment when the crime that might be revealed by his testimony is perjury in a prior proceeding. See, *e.g., United States* v. *Housand, supra; United States* v. *Partin,* 552 F.2d 621, 623 (5th Cir.), *cert. denied,* 434 U.S. 903 (1977).

But Fleischacker never explained to the district court that the incrimination he feared related to perjury in his earlier testimony.[17] Nor did he show that he was likely to be endan-

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[16] Fleischacker apparently signed statements, under penalty of perjury, that his interview statements, as transcribed, were true and correct. (See A. 435.) The sworn statements do not appear with the copy of the interview transcripts included in the appendix.

[17] He argued only that his Fifth Amendment claim was valid because his testimony would not be information derived from the immunized testimony. Fleischacker's counsel, Mr. McNamara, addressing the court during the deposition, stated:

> "In asserting Fifth Amendment privilege Mr. Fleischacker is concerned that testimony he might give here today would form the basis for some prosecution of him by either an agency of the Government of the United States or an agency of the State of New York, or an agency of the State of New Jersey, and that he might be charged with a crime premised upon this testimony. It is our view, your Honor, that his testimony here today is not

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gered by his answers. See *United States* v. *Melchor Moreno, supra; United States* v. *Curcio, supra.*

There may be a theoretical possibility that a witness' testimony will show perjury in virtually every case where the witness has previously testified on the same or a similar subject. But if this possibility, without any explanation from the witness, were held sufficient to sustain a Fifth Amendment claim, it would be virtually impossible to get any testimony from such a witness.[18] To avoid this problem while protecting the witness' rights, the court, we suggest, should require that the witness—at the very least—make clear that it is perjury that concerns him

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> immunized, and that there is no authority to immunize his testimony here today. . ."

A. 391-392. See also A. 400-401, 403, 405, 413, 420 (objections on ground that questions are not derived from immunized testimony). Mr. McNamara cited *United States* v. *Housand, supra,* a case that did involve possible perjury incrimination. A. 420. But he did not question or disagree with the Court's response: "I understand that that case [*Housand*] dealt with perjured testimony. We don't have that question here." *Id.*

[18] In *United States* v. *Curcio, supra,* the Second Circuit addressed a somewhat similar problem. There, the secretary-treasurer of a labor union was subpoenaed to testify and produce documents before a grand jury. When he appeared before the grand jury he failed to produce the subpoenaed records and refused on Fifth Amendment grounds to answer questions about their whereabouts other than to state that such records existed but were not in his possession. In affirming an order holding him in contempt, the Second Circuit found that his vague contentions about possible incrimination were insufficient. Moreover:

> "This requirement to produce [documents] would be no more than an empty and meaningless form of words if the lawful custodian of the records could hand over possession to another and then refuse to say when or where he had last seen them on the ground that any testimony on the subject would tend to incriminate him. To sustain the privilege here asserted would provide an easy method by which any investigation could be hamstrung from the start." 234 F.2d at 475.

and give some indication of the basis for his fear of incrimination.[19] The court would then be in a better position to fulfill its obligation under *Hoffman* v. *United States, supra,* to determine whether the testimony might provide evidence of perjury and whether it might be used against the witness in a perjury prosecution.

Because Fleischacker failed to explain this aspect of his Fifth Amendment claim, the district court had no opportunity to determine its validity, and Fleischacker should not be permitted to make an argument based on possible use of his testimony to prove perjury for the first time in his appeal to this Court.

D. The Order Compelling Fleischacker's Testimony Was Not a Judicial Grant of Immunity.

Fleischacker argues that the district court's order compelling his testimony should be reversed because it confers immunity as to new testimony, and thereby intrudes on the power of the Department of Justice to control immunity grants. The Fifth Circuit, in its recent decision, *In re Corrugated Container Antitrust Litigation, supra,* accepted this argument and, therefore, refused to compel testimony from witnesses who, in circumstances identical to Fleischacker's, claimed Fifth Amendment privilege. But the Eighth Circuit in *Starkey, supra,* expressly rejected this argument. Assuming that an immunized witness' own subsequent testimony can be "derived" evidence within the meaning of the immunity statute, we find more persuasive the Eighth Circuit's reasoning as to why a court does have the power to determine whether the testimony sought will in fact be so closely connected to the immunized testimony as to be "derived".

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[19] In *Housand,* the witness had made clear that he feared his testimony would be used in a prosecution for perjury or inconsistent statements. See *United States* v. *Housand, supra,* 550 F.2d at 821. But in *Starkey,* where appellant did not raise the perjury issue, the court did not consider it.

It is true that a court has no power to grant immunity absent a request by the Department of Justice. See *Ullmann* v. *United States, supra; United States* v. *Turkish,* 623 F.2d 769 (2d Cir. 1980); *Ellis* v. *United States,* 416 F.2d 791, 796-97 (D.C. Cir. 1969); *In re Daley,* 549 F.2d 469 (7th Cir.), *cert. denied,* 434 U.S. 829 (1977).[20] And it is also true that if a witness is compelled to testify over a claim of privilege, his answers may not be used against him. See *Maness* v. *Meyers,* 419 U.S. 449, 474-475 (1975) (White, J., concurring). This does not mean, however, that a court invades prosecutorial prerogatives when it determines that a witness' Fifth Amendment claim is without merit and orders him to testify.

As the Eight Circuit in *Starkey* and Judge Johnson dissenting in *Corrugated* explained, a court may—and indeed must—determine the scope of immunity already granted when necessary to determine whether a claim of privilege is valid. *Appeal of Starkey, supra,* 600 F.2d at 1047-1048; *In re Corrugated Container Antitrust Litigation, supra,* 620 F.2d at 1095. See also *Hoffman* v. *United States, supra; Patrick* v. *United States,* 524 F.2d 1109, 1120 (7th Cir. 1977).

Thus, if a witness' derived testimony is covered by the immunity statute, a court faced with a claim of Fifth Amendment privilege by a witness who has formerly testified under a grant of immunity must determine, for each question, whether the possibly incriminating testimony sought will be derived. If the court can determine that it will be, the claim of privilege must be denied and the witness ordered to testify.[21] But if the

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[20] 18 U.S.C. 6003 provides that the United States attorney may obtain an immunity order for a witness whose testimony is sought "at any proceeding before or ancillary to a court of the United States or a grand jury of the United States" if he determines that the testimony may be necessary to the public interest. The power is not limited to actions to which the United States is a party.

[21] By not compelling testimony if there is any doubt that it will be derived, the judge limits any risk of inadvertent judicial creation of immunity through failure to limit the testimony compelled to that which will actually be derived.

court finds a possibility that it will not be derived, the court should permit the witness to remain silent.[22] And the court should not issue a broad order compelling testimony, but should examine the questions individually to see that each arises from use of and is within the scope of the immunized testimony.

III. IT COULD ALSO BE CONCLUDED THAT THE IMMUNITY STATUTE DOES NOT PROTECT FLEISCHACKER FROM USE OF HIS OWN SUBSEQUENT TESTIMONY, AND THUS THAT HE DOES HAVE A FIFTH AMENDMENT RIGHT TO REMAIN SILENT.

The immunity statute can also be construed, however, as not prohibiting prosecutorial use of testimony given in a subsequent proceeding by the immunized witness himself, even if that testimony is based on the witness' immunized testimony. If this is the correct construction of the statute, then Fleischacker should not be compelled to testify since he has asserted his Fifth Amendment privilege.

The alternative analysis we suggest differs from the argument made by the witness in this case and has not been discussed in the decisions construing the immunity statute, but we believe that it merits this court's consideration. It is based on two propositions: that the Fifth Amendment bars use of a witness' testimony against him only if that testimony is compelled; and that the immunity statute prohibits use of a witness' immunized testimony only to the extent necessary to provide the equivalent of the Fifth Amendment privilege, *Kastigar* v. *United States, supra.*

A witness who has testified under a grant of immunity has the opportunity, when called to testify in a subsequent action, to

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[22] Thus the Eighth Circuit ruled in *Starkey, supra,* that questioning would be limited to matters within the scope of the grand jury testimony. For if questions go beyond this there is reason to doubt that they result from use of the immunized testimony.

refuse to answer a question if he fears that his answer might provide incriminating information. Thus the situation where a witness is questioned using his immunized testimony is different from that in which evidence is derived from sources which the witness cannot control.[23]

If the witness freely chooses to answer questions based on his immunized testimony, the Fifth Amendment does not prohibit use of his answers against him, for the testimony has not been compelled.[24] And if he chooses not to testify voluntarily, he can assert his Fifth Amendment privilege and thus assure that no additional incriminating evidence will be created.[25] In either case, therefore, even if the testimony could

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[23] That is, whether subsequent testimony is covered by the immunity statute turns not on how it was obtained or how closely it is connected with the immunized testimony, but on whether the person from whom it is obtained is the immunized witness or some other party.

[24] Certainly, if a witness, having given immunized testimony at a trial, thereafter voluntarily answered questions asked by a reporter on the basis of that testimony, the previous grant of immunity should not bar the government from using the witness' voluntary incriminating statements against him, even though the questions and answers would in a sense be "fruits" of the immunized testimony. For it would be the witness' election to respond to the questions, rather than any compulsion proscribed by the Fifth Amendment, to which the incriminating statements would properly be ascribed. See *United States* v. *Kuehn,* 562 F.2d 427, 432 (7th Cir. 1977). There, as in the case of a witness who responds to questions based on his prior testimony in a formal proceeding without claiming his Fifth Amendment privilege, it could be said in a strict causal sense that the witness' answers would be derived from his immunized testimony. But the policies underlying the Fifth Amendment and 18 U.S.C. 6002 do not require that the prior immunity be construed to extend to such voluntary statements. See *Maness* v. *Meyers, supra,* 419 U.S. at 466, 470 (Stewart, J., concurring).

[25] Under this alternative construction of the statute, the court, before requiring the witness to testify, must determine whether the testimony may provide evidence of criminal conduct and whether

(Footnote continued on following page.)

otherwise be deemed derived under the standards discussed in part II of this brief, it is unnecessary to construe the prior grant of immunity to displace the witness' constitutional privilege.[26]

In this case, Fleischacker did assert his Fifth Amendment privilege when the subsequent testimony was sought. Therefore, if this interpretation of the statute is correct, the court should not have compelled him to testify but should have evaluated and ruled on his claim in the usual manner, basing its decision on the premise that the immunity statute would not preclude prosecutorial use of any incriminating testimony that Fleischacker might give.

(Footnote continued from preceding page.)

there is a possibility it may be used to prosecute the witness (see part I of this brief). If it compels testimony because one or the other of these requirements is not satisfied, it does not intrude on prosecutorial control of immunity by doing so. Of course, if the witness receives a new grant of statutory immunity, his testimony may then be compelled and cannot be used against him.

[26] This construction of the statute may make it more difficult for private parties to obtain testimony, and could also therefore, increase the number of requests to the Department of Justice for grants of immunity in private litigation. But it would give the government greater control over the scope of immunized testimony. For it reduces any possibility that, through collusion or otherwise, a private party might elicit immunized testimony that would impede prosecution of immunized witnesses.

CONCLUSION

The federal immunity statute governs the outcome in this case, and there are two reasonable ways of construing that statute. Neither is more clearly compelled by the language of the statute, its legislative history, or the public interest. Therefore, while we have suggested how this Court might analyze the issue presented, the United States takes no position as to whether this Court should hold that the testimony sought is within the protection of the immunity statute, and, therefore, affirm the contempt order, or whether it should hold that the statute does not prohibit prosecutorial use of a witness' own subsequent testimony, and, therefore, vacate the order.

Respectfully submitted,

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